Office-Supreme Court, U.S.
FILED
DEC 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 72.

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION and PHILLIPS PETROLEUM COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

JOHN W. REYNOLDS,
Attorney General,
ROY G. TULANE,
Assistant Attorney General,
State Capitol,
Madison 2, Wisconsin,
Attorneys for State of Wisconsin

WILLIAM E. TORKELSON,
Chief Counsel,
State Office Building,
Madison 2, Wisconsin,
Attorney for Public Service Commission of Wisconsin

KENT H. BROWN,
Counsel,
55 Elk Street,
Albany 1, New York,

MORTON L. SIMONS,
1815 H Street, N. W.,
Washington 6, D. C.,

BARBARA M. SUCHOW,
120 Church Street,
New York 7, N. Y.,
Attorneys for Public Service Commission of the State of New York

Dated: December 14, 1962.

INDEX.

	PAGE
I. While the Natural Gas Act gives the Commission discretion to choose and effectuate any reasonable method of regulation, it does not give the Commission discretion to pursue a program which amounts to no regulation at all	3
II. The Commission's present program is ineffectual	10
A. Inadequacies of producer program are underscored by comparison with pipeline regulation	10
B. The Commission's application of its SGP rates affords no protection to the consumer	13
C. The Commission's claim that price increases have been "arrested" is questionable and, in any event, is irrelevant	17
D. Price stability achieved in certain cases is a result of intervener effort	19
III. The area price venture will not be delayed by a remand here	20
IV. The Commission's decision here is at odds with its most recent opinion on producer rate matters	23
V. The issues raised by petitioners are properly before this Court	26
Conclusion	31
APPENDIX A	33
APPENDIX B	35

Table of Authorities.

Court Cases:

	PAGE
Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U. S. 378 (1959)	15, 16
Bel Oil Corp. v. *F. P. C.*, 255 F. 2d 548 (5th Cir. 1958), *cert. denied*, 358 U. S. 804	5, 10
Cities Service Gas Co. v. *F. P. C.*, 155 F. 2d 694 (10th Cir. 1946), *cert. denied*, 329 U. S. 773	5, 6
City of Detroit v. *F. P. C.*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829	3, 4, 5, 15
Colorado Interstate Gas Co. v. *F. P. C.*, 324 U. S. 581 (1945)	4, 5, 7-8
Episcopal Theological Seminary v. *F. P. C.*, 269 F. 2d 228 (D. C. Cir. 1959), *cert. denied*, 361 U. S. 895	5, 6
F. P. C. v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944)	5
Forest Oil Corp. v. *F. P. C.*, 263 F. 2d 622 (5th Cir. 1959)	5
Hennesey v. *S. E. C.*, 285 F. 2d 511 (3rd Cir. 1961)	29, 30
Interstate Natural Gas Co. v. *F. P. C.*, 156 F. 2d 949 (5th Cir. 1946), *affirmed*, 331 U. S. 682	5
Minneapolis Gas Co. v. *F. P. C.*, 294 F. 2d 212 (D. C. Cir. 1961)	5
Panhandle Eastern Pipe Line Co. v. *F. P. C.*, 143 F. 2d 488 (8th Cir. 1944), *affirmed*, 324 U. S. 635	5
Pennsylvania Water & Power Co. v. *F. P. C.*, 193 F. 2d 230 (D. C. Cir. 1951), *affirmed*, 343 U. S. 414	5
Public Service Commission of New York v. *F. P. C.*, 361 U. S. 195 (1959)	16

F. P. C. Cases:

Champlin Oil Co., G-9277	22
Continental Oil Co., G-11024 (*Catco* on remand), 27 FPC 96 (1962)	16, 19

PAGE

Gulf Oil Corp., G-9520, Examiner's Decision (Sept. 24, 1962) 20, 23

Hunt Oil Co., G-9065, Op. 365 (Oct. 17, 1962) 20, 23-26

Skelly Oil Co., G-18638, Op. 362 (Aug. 30, 1962) 17, 19

Sohio Petroleum Co., G-8488, Examiner's Decision (Oct. 30, 1962) 23

Union Oil Co. of California, 16 FPC 100 (1956) 9-10

STATUTES AND REGULATIONS:

Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. §§80a-1 to 80a-52, Section 43(a), 15 U. S. C. §80a-42(a) 29

Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. §§717-717w:

Section 4 ..... 14, 20, 23, 26, 27, 30, 31
Section 5 ..... 22, 26, 27, 28, 30, 31
Section 5(b) 4
Section 6 4
Section 8(a) 4
Section 9(a) 4
Section 10(a) 4
Section 14(b) 4
Section 19(a) 28
Section 19(b) 29

Regulations under the Natural Gas Act, 18 CFR, Chapter I:

Section 154.1 *et seq.* 12
Section 154.63 13
Section 154.91 *et seq.* 12
Section 154.94 13
Section 260.1 11
Section 260.5 11
Section 260.6 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 72.

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL POWER COMMISSION and PHILLIPS PETROLEUM COMPANY,

Respondents.

ON WEIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

In our main brief we contended that, having conducted its rate investigation of Phillips Petroleum Company to the point of decision, the Federal Power Commission was required to fix just and reasonable rates for Phillips by reference to the company's costs; and that it was not free to terminate the completed investigation without making a finding on the justness and reasonableness of Phillips' rates merely because it had, contemporaneously with its termina-

tion of the Phillips investigation, decided to explore a new and untried industry-wide method of producer regulation. We pointed out that the effect of the Commission's decision was to frustrate the primary purpose of the Natural Gas Act to assure that consumers would pay no more than a just and reasonable rate.

In its brief, the Commission presents a three-part defense of the action here under review. First, it states that the Natural Gas Act does not require any particular method of rate-making, so that it was free to reject the individual-company cost method proposed and pursued by all parties to the Phillips proceeding. Second, though it tacitly concedes that area rate-making cannot become effective for many years, it claims that the interim program it is following is "vigorous and effective" and has "arrested" the upward trend in producer prices. Finally, it contends that a remand here, requiring continued use of the individual-company cost method until such time as area pricing becomes effective, would interfere with and materially delay the conclusion of the area rate proceedings.

In this reply, we shall discuss each of the defenses raised by the Commission. In addition, we shall discuss the significance here of the Commission's *Hunt* opinion, decided subsequent to the filing of our main brief, and the contention, made principally by Phillips but echoed to some extent by the Commission, that certain of the issues which we raised in our main brief are not properly before this Court.

I. While the Natural Gas Act gives the Commission discretion to choose and effectuate any reasonable method of regulation, it does not give the Commission discretion to pursue a program which amounts to no regulation at all.

In what is apparently intended as a response to our contention that it may not abandon meaningful regulation, the FPC argues at length (FPC brief, pp. 17-35) that the Natural Gas Act endows the Commission with considerable discretion in the choice of a regulatory method. The Commission's purpose in presenting this argument is somewhat ambiguous. If, on the one hand, the Commission means to suggest that it should be given freedom to adopt and effectuate a new regulatory method at the conclusion of the area proceedings five or ten years from now, then its argument is surely premature—we have as yet seen nothing more than the preliminary and tentative outlines of such a new method, whose ultimate legality and desirability we do not and cannot now challenge.

If, on the other hand, this portion of the Commission's brief is intended as a defense of its *present* program for producer rate control—in which the element of cost is largely disregarded—then it constitutes a collateral attack on *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829, and becomes an argument that the Natural Gas Act permits the Commission to fix rates for natural gas companies without regard to cost.[1] This

[1] In our main brief (pp. 20-21) we stated that it was not clear "whether the FPC's new area price method was intended merely to change the *unit* of regulation—from the individual producing company to all producers in a given producing area—or whether it was intended to change the *basis* of

argument finds no support either in the statute, in logic, or in the decided cases.

The specific provisions of the Natural Gas Act (Sections 5(b), 6, 8(a), 9(a), 10(a), and 14(b)) make clear that the Act was designed for cost-of-service regulation. See *Colorado Interstate Gas Co.* v. *F. P. C.*, 324 U. S. 581 at 602 (1945). But even if the statute were completely silent on the matter, it would be little more than elementary common sense that a regulatory agency, in fixing rates for a commodity or service, should ascertain what the seller's costs are in providing that commodity or service. Indeed, this principle is both so rudimentary and so deeply ingrained in regulatory statutes which, like the Natural Gas Act, provide for the fixing of "just and reasonable rates", that discussion of which method of regulation is to be followed implicitly means which method of *cost* regulation is to be followed, and it is extremely doubtful whether any method which ignores cost is in fact a method of *regulation*.

The Commission cites an impressive group of cases in support of its thesis that it has discretion to fix rates by any method it chooses, including a *non*-cost method. An examination of these cases, however, reveals that none contradict—in fact, most affirmatively support—petitioners' contention that under the Natural Gas Act rates must be based on cost.

---

regulation—from fixing rates by reference to the cost of the regulated unit to fixing rates by reference to non-cost data."

We added that, on the basis of the representations contained in the FPC's Brief in Opposition to the grant of certiorari, we assumed that it was the intent of the FPC, "under its new method, to regulate on a cost basis".

To the extent that the Commission now attacks *City of Detroit*, however, it would appear that such an assumption was unwarranted.

The cases cited by the FPC fall into three groups: (1) six cases,[2] decided between 1944 and 1951, all affirming the FPC's use, in fixing rates, of a cost-of-service method incorporating an original-cost rate base; (2) three cases,[3] decided in 1958 and 1959, affirming FPC rulings that, as a matter of law, the Commission could not grant rate increases in the absence of cost data; and (3) two cases[4]—one decided in 1955, the other in 1961—reversing the FPC's allowance of rate increases in the absence of cost data.

It is thus clear that the *holdings* in these cases do not support the Commission's thesis that it is free to use a non-cost method. In recognition of this, the Commission relies not on the holdings but rather on selected passages (in many cases pure dicta) to the effect that the Commission is not bound to any particular formula in fixing rates. Even these, however, fail to support the Commission's thesis.

To begin with, it is plain from the context in which the passages appear that the courts were discussing no more than the issue before them—whether the Commission could use a cost method allowing return on an original-cost rate base rather than a cost method allowing return on a fair-value rate base. Thus, the statements that the Commission was not bound to any particular formula meant only that

---

[2] *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Colorado Interstate Gas Co.* v. *F. P. C.*, 324 U. S. 581 (1945); *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 143 F. 2d 488 (8th Cir. 1944), *affirmed*, 324 U. S. 635; *Cities Service Gas Co.* v. *F. P. C.*, 155 F. 2d 694 (10th Cir. 1946), *cert. denied*, 329 U. S. 773; *Interstate Natural Gas Co.* v. *F. P. C.*, 156 F. 2d 949 (5th Cir. 1946), *affirmed*, 331 U. S. 682; *Pennsylvania Water & Power Co.* v. *F. P. C.*, 193 F. 2d 230 (D. C. Cir. 1951), *affirmed*, 343 U. S. 414.

[3] *Bel Oil Corp.* v. *F. P. C.*, 255 F. 2d 548 (5th Cir. 1958), *cert. denied*, 358 U. S. 804; *Forest Oil Corp.* v. *F. P. C.*, 263 F. 2d 622 (5th Cir. 1959); *Episcopal Theological Seminary* v. *F. P. C.*, 269 F. 2d 228 (D. C. Cir. 1959), *cert. denied*, 361 U. S. 895.

[4] *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829; *Minneapolis Gas Co.* v. *F. P. C.*, 294 F. 2d 212 (D. C. Cir. 1961).

the Commission had discretion to follow one cost formula rather than another, and not, as the Commission seems to argue here, that it has unlimited discretion to choose a non-cost method. Moreover, the repeated judicial observation in the opinions cited by the FPC that the Commission is permitted considerable latitude in giving effect to the Congressional purpose not only defines the breadth of the agency's discretion but the limitation on it as well. That is, discretion is implied as far as, but no further than, necessary to carry out the purposes of the Act.[5]

The Commission's mistaken reliance on the cited cases to support its thesis that cost is unnecessary may be explained in part by its confused use of terms: the Commission has repeatedly used "original-cost method" to mean the same thing as "cost method".[6] "Original-cost" refers to the manner in which rate base or investment is computed; the alternative to an original-cost rate base is a reproduction-cost or fair-value rate base.[7] But once the investment has been computed, by whatever method, it is then used as the base for allowing a return, which return

---

[5] "In delineating the scope of review, the courts have left no doubt of their disposition to give the Commission a free rein in the effectuation of the Congressional purpose" [previously defined to be] "to 'protect consumers against exploitation at the hands of natural gas companies.'" *Cities Service Gas Co.* v. *F. P. C.*, *supra* note 4, at 698.

[6] A particularly flagrant example of the FPC's incorrect and imprecise use of these terms occurs at pages 19-20 of its brief, where the Commission alleges that it argued in its brief to this Court in the *Hope* case that, "although the cost-of-service method had not been expressly written into the statute, Congress intended cost of service to be used insofar as constitutionally possible." Reference to the FPC's brief in that case, however, reveals that the Commission did not argue this point at all; rather it argued that an original-cost rate-base method had been intended by Congress. Accordingly, the Commission's present contention that "the *Hope* decision rejected the substance of the very contention now advanced by petitioners" is without foundation in fact.

[7] There are, of course, variants of each of these methods.

is added to the allowance for actual operating costs to arrive at a total cost of service. It is the use of a cost of service to fix rates which constitutes the cost method.

Thus, a court holding that an original-cost rate base need not be used in fixing rates would *not* be a holding that a cost method need not be used.

The lack of precision which characterizes the Commission's use of terms also characterizes its use of quoted material. For example, on page 20 of its brief the Commission represents that in *Colorado Interstate Gas Co.* v. *F. P. C., supra*, this Court

> "suggested that the Commission would not be precluded from using an area-price approach ('Some have thought that to be the wiser course.' *Id.* at 601) in lieu of the rate-base method."

Wholly aside from the fact that such a suggestion would have no logical meaning—area pricing refers to the *unit* of regulation and could be applied on either a cost or non-cost basis, whereas rate-base method is a means for determining one element of an overall cost of service—the fact is that the Court simply did not make the suggestion which the Commission ascribes to it. We quote the passage from which the Commission has taken but a single sentence; in context, it means not what the Commission says but precisely the opposite:

> "It is obvious that when rates of a utility are fixed the value of its property is affected. For as we stated in the *Hope Natural Gas Co.* case, value is 'the end product of the process of rate-making not the starting point.' 320 U. S. p. 601. When a natural-gas company which owns producing properties or a gathering system is restricted in its earnings by a rate order, the value of all of its property is affected. *Congress of course might have provided*

> *that producing or gathering facilities be excluded from the rate base and that an allowance be made in operating expenses for the fair field price of the gas as a commodity. Some have thought that to be the wiser course. But we search the Act in vain for any such mandate.*" 324 U. S. at 601. (Emphasis added.)

Finally, the Commission relies on the cited cases to refute a position which it incorrectly ascribes to all petitioners—the position that under the Natural Gas Act the only method the Commission may use is an original-cost rate-base method. Such has never been our view. We freely concede that the Commission may use any reasonable cost method. What the Commission seems to advocate here is that it was free to reject the original-cost rate-base method, not because it was a *rate-base* method, nor because it was an *original-cost* rate-base method, but solely because it was a *cost* method. Thus, the issue on this aspect of the case is whether the Commission may fix rates without reference to *cost*, and not, as the Commission's brief suggests, whether in fixing rates it is limited to the original-cost rate-base method. If the Commission had actually fixed Phillips' rates by reference to a novel and unorthodox cost method, we would have an entirely different case, and it is this different case which the Commission appears to have briefed.

Perhaps the best and most comprehensive answer to the suggestion that the Commission has discretion to abandon cost was given by the Commission itself, six years ago, in the first producer case to raise the issue:

> "The applicants claim that the act does not limit the Commission to the use of any particular formula or combination of formulae in determining a just and reasonable rate under section 4(e). From that

premise applicants infer that the Commission may adopt the methods used to determine an unregulated price as a regulatory formula in rate making. . . .

"This reasoning is faulty. It supposes that because court decisions have held the Commission is not limited to the use of any one formula or combination of formulae in determining just and reasonable rates that the Commission is completely unfettered in its choice of ratemaking method. Applicants argue that in the exercise of its freedom of choice, the Commission should adopt the unregulated market as the proper guide in determining just and reasonable regulated rates. On this record it is not possible to strike a fair balance between investor and consumer interests. We cannot be sure that the rates are sufficient to promote exploration for and development of gas supplies and, at the same time, to provide the protection to the ultimate consumer contemplated by the act. Indeed, a delegation of power to make rates interpreted as broadly as applicants would have it, would permit the unregulated market to determine rates in the name of regulation. Such a result would be contrary to the clear direction of the act that this Commission should regulate these rates. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954).

"Sections 4 and 5 of the act set forth the end result test that rates charged by natural-gas companies shall be 'just and reasonable.' This is both a statutory and a constitutional requirement. *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U. S. 575, 586 (1942). We think the recent decision of the Court of Appeals for the District of Columbia Circuit in *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810 (C. A. D. C., 1956), *certiorari denied*, 352 U. S. 829, is controlling here. In referring the case back to the Commission for the taking of additional evidence, the Court held that in ratemaking the Commission must always 'relate its action to the primary aim of the act to guard the

consumer against excessive rates. If the Commission contemplates increasing rates for the purpose of encouraging exploration and development, * * * it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose. Further than this we think the Commission cannot go without additional authority from Congress." *Id.* at 817.

"We think it is plain from the language of the *City of Detroit* case, *supra*, that the value method used alone, as proposed by the applicants, is not a method of ratemaking open to us within our delegated power." *Union Oil Co. of California*, 16 FPC 100 at 109-110 (1956).[8]

II. The Commission's present program is ineffectual.

A. Inadequacies of producer program are underscored by comparison with pipeline regulation.

In considering the efficacy of the Commission's present program for producers, it is instructive to compare that program with the Commission's regulatory procedures for pipelines. It should be noted, of course, that the Natural Gas Act does not distinguish between pipelines and producers; rather it provides for regulation of all natural gas companies, which are defined as companies making sales of natural gas in interstate commerce. In its 1954 decision in this case, the Court held that one who sells natural gas for resale in interstate commerce does not escape federal regulation merely because he happens to be a producer.

A comparison of the two programs—pipeline and producer—reveals clearly that the Commission has taken a tiptoe approach to producer regulation, attempting to inter-

[8] Affirmed, *Bel Oil Corp.* v. *F. P. C.*, 255 F. 2d 548 (5th Cir. 1958), *cert. denied*, 358 U. S. 804.

fere with pre-existing practices as little as possible: whatever its theoretical merits, this approach has, as a practical matter, led directly to the very administrative problems of which the Commission now complains (brief, p. 29).

1. *Uniform System of Accounts.* As an indispensable first step to effective regulation, it is clear that regulated companies must maintain their books of accounts on a uniform basis. One of the Commission's earliest actions, upon receiving jurisdiction under the Natural Gas Act in 1938, was to establish a Uniform System of Accounts for natural gas companies, 18 CFR, Chapter 1, Part 201. Upon being directed by this Court in 1954 to regulate producers, however, the Commission chose to exempt them from the requirements of the Uniform System, and even now, more than eight years later, it has yet to prescribe such a system for producers. As a result, any rate proceeding, whether it is on an individual-company basis or on an area-rate basis, must first be preceded by an exhaustive examination and recasting of the books of the regulated entity.

2. *Annual Reports.* The annual reports filed by pipelines (Form No. 2) are exceedingly comprehensive, thereby enabling the Commission to review promptly whether any pipeline is earning an excessive return. Regulations under the Natural Gas Act, §260.1. In contrast, the annual report required of producers (Form No. 301) is an abbreviated report which merely shows sales made under each rate schedule. Regulations under the Natural Gas Act, §§260.5 and 260.6. Indeed, even as to this information the Commission apparently takes the view that it can obtain more reliable figures from the pipeline's annual report (each producer's sale, of course, is a pipeline's purchase, which the pipeline is required to show in its Form 2). Thus, the Federal Power Commission issues each year a

report showing sales by producers to interstate natural gas companies derived wholly from the pipelines' Form 2's.[9]

3. *Rate Schedules.* Although the Commission, as a matter of expediency at the advent of regulation in 1938, permitted each pipeline to file its various sales contracts as rate schedules, it has since 1948 required each pipeline to file a uniform tariff, so that all of a pipeline's customers similarly situated may purchase gas under the same tariff provisions. Regulations, §154.1 *et seq.* At the same time, however, the Commission has permitted producers to file their sales contracts as separate rate schedules and has never required the filing of a uniform tariff.[10] Regulations, §154.91 *et seq.* Thus Phillips has over 300 contracts and over 300 rate schedules; based on a reasonable estimate that each rate schedule on the average permits Phillips to file for an increase once every three years (and many contracts call for annual increases), this means that Phillips would file 100 rate increases each year. Operating under the filed-tariff system, on the other hand, pipelines have in recent years averaged about one system-wide increase every two years. It is this multiplicity of producer filings which enables the Commission to engage in such fantasies as the projected inability to reach current status "until 2043 A. D." (FPC brief, p. 29). In point of fact, if the Commission were to require no more than that each of the *major* producers file a single comprehensive non-discriminatory tariff, the tariffs of the

[9] In its brief (pp. 42-43) the Commission is critical of the information compiled by the Eastern Seaboard companies from the Form 2's, and in an appendix (pp. 69, 70) makes adjustments to the Eastern Seaboard figures based on information obtained through a recent exchange of correspondence between the Commission and the regulated companies. The FPC's impeachment of information contained in its own files is, to say the least, surprising.

[10] Cf. the examiner's decision in this case, R. 210, 214-216, which, in effect, would have required Phillips to convert to the filed-tariff system.

25 largest producers would cover over 60% of all sales in interstate commerce.

4. *Data in Support of Rate Increase Filings.* Even though most pipelines have no contractual inhibition limiting their right to file increases, the fact is, as noted above, that they file only on the average of once every two years. The principal reason for this restraint is the Commission's regulation requiring that every Section 4 rate increase filed by a pipeline be accompanied by detailed material showing, *inter alia*, the cost justification for the increase requested. Regulations under the Natural Gas Act, §154.63. Filings which do not comply with the Commission's rules may be rejected. In contrast, a producer is permitted to accompany his Section 4 rate increase filing with little more than a summary description of the nature of the increase and a statement that the increase is not contractually prohibited. Regulations under the Natural Gas Act, §154.94. As a result, the practice has been for producers to file for every increase to which they are contractually entitled, whether or not such increase can be supported by a cost showing.

B. The Commission's application of its SGP rates affords no protection to the consumer.

The Commission asserts (brief, pp. 35-37) that its application of the rate levels announced in its Statement of General Policy constitutes an adequate regulatory program.[11] This assertion cannot withstand close scrutiny.

---

[11] Cf. the recent dissenting opinion of Commissioner Morgan to the FPC's Fifth Amendment of its Policy Statement, August 30, 1962:

> "Under the terms of our Statement of General Policy No. 61-1, we have been attempting to carry out our responsibilities through the device of so-called *area prices—a currently fashionable synonym for what used to be called 'fair field prices.'*" (Emphasis added.)

The Policy Statement establishes in each area two levels of rates, the "old gas" rate and the "new gas" rate. The "old gas" rate, derived from the weighted average price in 1959, is used by the Commission to determine whether to suspend and investigate rate increases filed pursuant to Section 4. If, for example, a producer files for an increase from 10¢ to 15¢ in an area where the "old gas" price is 15.75¢, the Commission will not suspend or investigate even though the increase may amount to several million dollars annually and even though the increase will be passed along by the pipeline to its distributing company customers and by them to the ultimate consumer. If, on the other hand, a producer in the same area files for an increase from 15¢ to 16¢, the increase will be suspended.

(It is quite true that Section 4(e) speaks in permissive language with respect to the Commission's suspension of rate changes. As a matter of practice, however, the Commission has almost invariably suspended all *pipeline* rate increases filed under Section 4 and has set the justness and reasonableness of such increases for hearing even though, as noted, the pipeline is required to submit very substantial cost data in justification of the rate increase.[12] It was not until the advent of producer regulation that the Commission began on a wholesale basis to exercise its discretion *not* to suspend. To the extent this discretion is exercised, it always works to the benefit of the producer, who is thus freed from the obligation of proving his rate just and reasonable; the value of this benefit is enhanced by the fact

[12] The only instances we know of where pipeline rate changes are not suspended are (a) where the proposed change is a change in the form of the rate rather than a rate increase and (b) where the rate change is made pursuant to Commission direction following a hearing and decision in an earlier proceeding—as, for example, where the Commission in a given proceeding finds that a certain type of service is not bearing its fair share of overall costs.

that the producer need not present cost justification as part of his filing.)

The average price used by the Commission as a standard for determining whether to suspend is, of course, made up of prices which are both above average and below average. By adopting a policy which permits the below-average price to rise to the average level, the Commission permits an increase in the average itself. And unless it is assumed that a price is just and reasonable because it is no more than the average—an assumption inconsistent with *City of Detroit, supra*—then the Commission's policy permits, without suspension, investigation, or purported justification, increases to levels which are not just and reasonable.

The "new gas" prices stand on little better footing. These levels, based on the highest previously certificated price in each area, are used to determine whether a new price is "out of line" within the meaning of this Court's Catco decision, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378 (1959). To the extent that such levels are above the in-line level—and many, having been based on subsequently condemned initial prices, are—they have no validity whatsoever. To the extent that they coincide with the in-line level, they neither add to nor detract from the level of protection required by *Catco*. The Commission's claim that changes in its Policy Statement prices reflect an active regulatory program is at best a gross overstatement—the two occasions which the Commission cites are merely cases in which the Commission has attempted to correct, and then not successfully, earlier errors which it had made when it announced price levels that were out of line under the relevant court decisions. Thus the original 23.25¢ Southern Louisiana initial price level announced by the Commission in October 1960 (24 FPC 902; 24 FPC 1020 at 1038) was based on price

levels involved in the reversals by this Court of *Catco* (*Atlantic Refining Co.* v. *Public Service Commission of New York, supra*) and *Transco-Seaboard* (*Public Service Commission of New York* v. *F. P. C.*, 361 U. S. 195 (1959)).[13] In belated recognition of these reversals, the Commission in October 1961 reduced the Southern Louisiana price by 2¢—to 21.25¢ per Mcf on-shore and 19.5¢ per Mcf off-shore, 26 FPC 661. (In light of the Commission's subsequent determination in the remanded *Catco* case, 27 FPC 96, that the appropriate in-line price is 20¢ on-shore and 18.5¢ off-shore, the present level still appears to be excessive.)

The second reduction referred to by the Commission—from 18¢ to 16¢ in Texas District No. 4—has a similar history. The 18¢ level had also been based on price certifica-

---

[13] The Commission's statement (brief, p. 36) that the originally announced Southern Louisiana level was "21.5¢ *plus* State taxes of 2.3¢ per Mcf" is factually incorrect, as is the subsequent statement that the "reduction for State-taxed gas was 2.55¢ per Mcf". Actually, the originally announced ceiling was 21.5¢ plus *reimbursement* for State tax; since the usual reimbursement provision in producer-pipeline contracts called for reimbursement of only a portion of the State tax, which the Commission subsequently found to be 1.75¢ per Mcf, this meant that the level was 23.25¢—not 23.8¢ as the Commission now suggests in its brief. Similarly, when the Commission in October 1961 reduced this level to 21.25¢, the reduction was a 2¢—not a 2.55¢—reduction. The Commission's error in this regard is surprising inasmuch as the Commission's own press release issued at the time the level was reduced specifically refers to the original price level as 23.25¢ and to the reduction as a 2¢ reduction. See FPC Release No. 11705, October 31, 1961:

> "Washington, D. C., October 31, 1961—The Federal Power Commission today announced reductions of 2 cents per thousand cubic feet in the ceiling price levels on new sales of natural gas by independent producers from Southern Louisiana and Louisiana territorial waters.
>
> • • • • • •
>
> "The previous maximum price for both on and off-shore sales was 21.5 cents per thousand cubic feet, exclusive of state taxes. Tax reimbursement provisions vary from contract to contract. Generally, however, the FPC has utilized a total ceiling price of 23.25 cents, including taxes. Today's action accordingly results in a 2-cent reduction in the previously-used total ceiling price."

tions subsequently reversed by the courts. In a recently concluded evidentiary proceeding, *Skelly Oil Co.*, G-18638, order issued August 30, 1962, the Commission determined that at the time of the Policy Statement the appropriate price line was 15¢. Instead of reducing the erroneous 18¢ level to correspond to its own evidentiary finding, however, the Commission reduced it only two-thirds of the way; two commissioners dissented, contending that the price level should be reduced to 15¢.

In any event, the "new gas" levels are substantially in excess of the average price, so that Commission certification of new sales at these levels is certain to cause a rise in the average itself. In this respect, use of the "new gas" ceilings has the same inflationary effect as use of the "old gas" ceilings.

C. The Commission's claim that price increases have been "arrested" is questionable and, in any event, is irrelevant.

Central to the FPC's defense is its representation that it has "arrested" the rise in natural gas prices; in support of this claim, the Commission presents two graphs (FPC brief, pp. 34, 35).

Although the Commission appears to be using "arrest" in the sense of "stop" or "halt", the figures and graphs presented by the Commission show not that the price increases have been halted but only that the rate of increase is not as steep as previously.[14] This may be good differen-

[14] The Commission states (brief, pp. 34-35) that in 1961 the weighted average price of gas increased by only 5% over 1960, and that in 1962 the percentage might even be less. In developing this thesis the Commission relies on Bureau of Labor Statistics figures, which may be somewhat understated in that they do not include producer sales made to Tennessee Gas Transmission Company, in recent years a large and consistently high-cost purchaser. Although the Commission also represents (brief, p. 35, n. 19a) that

tia. alculus, but it does not qualify as good regulation: price stability at levels never tested for justness and reasonableness manifestly deprives the consumer of his basic statutory right to pay no more than "the lowest reasonable rate", especially where, as here, the level is an all-time high, more than double the level of the early fifties and more than triple the level of the mid-forties. (See Appendix A.)

Since the FPC relies so heavily on the BLS figures, some price comparisons are in order. The BLS natural gas series is part of the wholesale price index; it was instituted in January 1958, at which time the average wellhead price was 12.38¢ per Mcf, and it is computed on the basis of January 1958 equals 100. The most recent BLS figures (September 1962 preliminary) show a natural gas index of 135.1. For all wholesale prices, using a base of 1957-59 equals 100, the September 1962 index is 101.2; for all commodities other than farm and food, the index is 100.8; and for "fuels and related products, and power", the group heading under which natural gas is included, the index again is 100.8. The BLS data thus reveal that while the past five years have been a period of almost complete stability in wholesale prices generally, one wholesale price, and a regulated one at that, natural gas, has risen dramatically. Nor would a materially different result be obtained by using a different base period; in each year since 1950, the average wellhead price of gas has set a new record high.[15]

"preliminary indications are that October [1962] will show a decline", we are advised by BLS, as this brief goes to press, that no October figures are as yet available.

[15] Comparative data shown in Appendix A.

D. Price stability achieved in certain cases is a result of intervener effort.

At pages 37-44 of its brief the Commission argues that "stable prices at lower levels have been achieved in numerous important cases." Most of the cases cited by the Commission are those in which the stability resulted from the efforts of interveners (including the petitioners here), frequently after obtaining court reversal of improper FPC action.

For example, the Commission alleges (brief, pp. 38-39) that in the remanded *Catco* case, following hearings, a lower initial price was fixed, and that similar results have been achieved through settlement in numerous other cases. The Commission does not state that *Catco* was remanded at the instance of the New York Commission and other interveners; that most of the cases in which the initial price was reduced through settlement were proceedings remanded by the courts at the instance of the New York Commission and the distributing company interveners; and that in each of the settlements it was the accord or acquiescence of the interveners that permitted disposition of the docket.

In the *Skelly Oil* proceeding, referred to at page 39 of the Commission's brief, the lower price was urged by the New York Commission and the three distributing company petitioners in No. 74.

The matter of the producer rate settlements (FPC brief, pp. 39-40) has already been covered in our main brief (pp. 33-36); we note here merely that the settlement prices approved by the FPC were based on field price standards and were substantially in excess of the rates that would have resulted from application of cost-of-service principles.

With respect to the Commission's action in Section 4(e) proceedings (FPC brief, pp. 40-41), it is quite true that the FPC has recently set a handful of extremely high prices for expedited hearing; but again, this procedure was first taken at the instance of a distributing company intervener.

The Commission's reference to the *Hunt Oil Company* case, Opinion No. 365, issued October 17, 1962, is discussed below (Point IV, *infra*).

III. The area price venture would not be delayed by a remand here.

The Commission alleges (brief, p. 47), "it is clear that the Commission cannot effectively pursue both [the area rate proceedings and the individual-company rate cases] at the same time" and (brief, p. 45), "It is clear, moreover, that a decision by this Court, the effect of which is to require the Commission to reopen the records in this and all other unsettled Section 5(a) cases in which hearings have been completed, would necessarily tend to delay area rate proceedings." The Commission nowhere furnishes the basis for its claim that remand would cause delay, and it is certainly not clear to these petitioners, who have participated extensively in FPC proceedings over the past eight years, that delay would result or even tend to result.[16]

The reason little, if any, delay may be anticipated can best be understood by comparing the widely different procedural statuses of the individual-company rate cases, on the

[16] Nor is such a claim clear to the Commission's examiners who have actually heard and decided major producer rate cases. See, e.g., *Gulf Oil Corp.*, G-9520 *et al.*, Examiner's Decision issued September 24, 1962, Mimeo. pp. 5-6, 77-79, reprinted as Appendix B hereto.

one hand, and the area rate proceedings, on the other. There is presently only one area rate proceeding in progress; there is little likelihood that the hearing will conclude within a year; and following the conclusion of the hearing, it can be anticipated that another twelve to eighteen months will be required for briefing and examiner's decision. Accordingly, there will be no area rate case for the Commission to decide for at least another two years.

On the other hand, a reopening, *where necessary*, of the individual company rate cases in which hearings have been concluded would require only a very brief period, on the order of 30 to 60 days. This is not a matter of speculation: following the Commission's *Phillips* decision under review here, the records in a number of pending producer cases were reopened to permit all parties to make cost presentations based on their interpretation of the cost-finding methods used by the Commission in the *Phillips* opinion; in almost all instances this phase of the proceedings took less than 90 days and did not require any additional field investigation by any party.

Thus, as a practical matter, the disposition now of the individual-company cases, which are 95% complete so far as the evidentiary phase is concerned and which require only Commission decision, will not interfere with the progress of the area rate proceedings, which in their present posture require additional staff work but no Commission decision for some years.

There are, moreover, sound reasons why the individual-company cases should be decided as promptly as possible. In the first place, the disposition of the individual-company cases will assure that at least the rates of *those* companies are just and reasonable; surely some progress is better than none at all. In the second place, the decision of the individ-

ual-company cases will necessarily dispose of many of the issues which otherwise would be deferred until decision of the area rate proceedings; this cannot help but expedite the area rate hearings.[17] Finally, despite the Commission's present favorable attitude toward area pricing, there is no guarantee that, faced with a specific record in the first area rate proceeding to come before it, the Commission will conclude that area pricing is a desirable or even a workable method.[18] To the extent that the Commission proceeds on a company-by-company basis, it will accomplish definite and tangible results which will, at the very least, provide a hedge in the event that area rate making should prove to be less than the panacea it is now thought to be.

Before leaving this point, we would like to make clear that we have never insisted in this case or in any of the pending proceedings that the record *must* be reopened to receive later test year data. It is our view that the Commission may properly fix rates based on test year costs

---

[17] In this respect it is important to note that deferring the ultimate resolution of matters inherent in an individual-company case to an area rate proceeding does not avoid the problem; it merely delays its disposition. The Commission's allegation (brief, p. 29) that "the difficult choice between one or another method [of cost allocation] may, in the case of any given producer, mean the difference between bankruptcy and large profits" is hardly an argument in support of area rate making, for there the equally difficult choice could mean the difference between bankruptcy and large profits for all producers in an area.

[18] In point of fact, the industry-wide approach is not really new. In 1958, the Commission consolidated a substantial group of then-pending Section 5(a) proceedings—*Champlin Oil Co. et al.*, G-9277 *et al.*, popularly known as the Omnibus Case—and extensive hearings were held at which the major producers, various interveners, and the FPC staff presented, cross-examined, and rebutted industry-wide information. This hearing, which ran 41 days during which 5600 pages of transcript were compiled, concluded in March 1959; so far as we know, no use has ever been made of the evidence so expensively accumulated there.

that are several years old.[19] If the *Commission* feels that the test year data are too stale, however, we do not contest its right to reopen for receipt of more current information. In short, our position has been that the Commission may either fix rates on the basis of the test year data, or, if it chooses, reopen for later data. The one alternative which we insist is *not* open to the Commission is dismissal of the proceedings merely because of a belief that the test year data are too stale.[20]

IV. The Commission's decision here is at odds with its most recent opinion on producer rate matters.

We noted in our main brief that in the two years following its Phillips decision the FPC had not taken action on any other producer rate case, although four such cases had been decided by FPC examiners and were ready for Commission decision; we also noted that hearings had concluded with respect to eight other producers. Subsequent to the filing of our brief, examiners have rendered decisions in two more cases—*Gulf Oil Corp.*, G-9520, Examiner's Decision issued September 24, 1962, and *Sohio Petroleum Co.*, G-8488, Examiner's Decision issued October 30, 1962. But the most significant intervening development has been the Commission's Opinion issued October 17, 1962 in the *Hunt Oil Co.*

[19] Our contention that the Section 4 dockets were improperly terminated is not, as the Commission professes to believe (FPC brief, p. 49), "essentially an argument that the record was stale", but is rather an argument that the 1954 test year data insofar as they related to revenue deficiency failed to justify allowance of the increases for the years 1955-1959, when revenues increased sharply.

[20] The Commission's fear that fixing present rates on the basis of an old test year will be unfair to the producer is, we think, exaggerated. See the response of the examiner in this case (R. 194-195) that Phillips would, at all times, "have the opportunity to file a new rate proceeding for the purpose of determining a new cost of service and a new level of 'just and reasonable' rates based thereon."

rate case, G-9065 *et al.*, one of the four cases previously decided by a hearing examiner. (At the time of its decision, the *Hunt* proceeding had been before the Commission for about a year, the examiner's decision having been rendered on October 2, 1961.)

In the Opinion,[21] which runs only six pages, the Commission finds that the record does not support Hunt's request for an increase but that

> "since the record was made prior to *Phillips*, when few guideposts had been laid down, we will remand the case to the examiner in order to give Hunt further opportunity to shoulder its burden of proof by introducing evidence solely on the items discussed herein in which we find the record deficient. *Such evidence shall be restricted to data for the test year utilized in the present record.* Other parties to the proceeding may also submit evidence under the same limitations if they so desire." (Emphasis added.)

After setting forth the items on which it desires additional evidence, the Commission concludes with these three paragraphs:

> "In addition to obtaining additional evidence and ascertaining a proper cost-of-service for Hunt it will also be necessary for the examiner to receive evidence and make findings as to whether the individual increased rates here in issue are just and reasonable. Our examination of the record in this case convinces us that *increased rates for specific sales cannot always be found to be just and reasonable solely on the basis of a comparison of individual company-wide costs with that company's revenues in a test year.* The mere fact, if it turns out to be a fact, that

[21] We have been advised by petitioners in No. 74 that the *Hunt* Opinion will be set forth in full as Appendix B to their reply brief.

company-wide overall unit costs for the test period are greater than comparable unit revenues cannot justify all specific rate increases no matter how high they may be; the deficiency may well result from the fact that other sales are made at rates below that which could be justified on a cost basis. In any event consumers should not necessarily be obligated to make up overall revenue deficiencies by paying rates which are higher than those prevailing in the production area where this higher price cannot be individually justified.

"*The use of individual company costs as a method for determining whether an independent producer's increased rates are just and reasonable appears to be necessary if we are to pass upon such rates at all prior to the establishment of area rates.* Cost-of-service was the method which was used in this proceeding and others pending before the Commission prior to the commencement of the area rate proceedings and, as we have previously indicated, we intend to continue to process and decide such proceedings as promptly as the record in each case permits. We believe that the record in these proceedings, as supplemented on remand, should provide a basis for determination of the justness and reasonableness of Hunt's section 4 increased rates at the time they became effective.

"The Section 5(a) aspect of the proceedings is in a different posture. There are currently pending area rate proceedings in the Permian Basin and Southern Louisiana in which a large percentage of Hunt's jurisdictional sales are the subject of investigations pursuant to Section 5(a). It is our hope that area proceedings will result in a timely determination of Hunt's rates for the future. However, in order to assure adequate protection to consumers against any unreasonably high rates of Hunt which may not be subject to an early determination on an area basis we will hold in abeyance further action

> on the 5(a) aspects of the case pending area rate determinations, with the understanding that 5(a) proceedings on some or all of Hunt's rates may be subject to reactivation if future circumstances should so dictate." (Emphasis added.)

The holding in *Hunt*, which represents the views of a unanimous Commission, seems to us to constitute a confession of error on the Section 4 aspects of this appeal and, by implication at least, a partial confession of error on the Section 5 aspects. (It is true that the Commission treated Hunt's Section 5 docket in a different manner than it treated the Section 4 dockets, but the logic of its treatment of the Section 4's would seem to carry over to the Section 5.) In its brief, the FPC attempts to distinguish *Hunt* on two grounds. First, it states (brief, p. 41) that in *Hunt* only "relatively minor supplementation of the record is required." Precisely the same is true of *Phillips*. Second, the Commission states (brief, p. 53, n. 37) that the potential discrimination in *Hunt* can be taken care of in the Section 4 dockets, whereas here, since the Section 4 dockets cover only past periods, present discrimination could not be eliminated by disposition of those dockets. We submit that discriminatory rates collected in the past may be partially corrected now through ordering refunds of all amounts in excess of a non-discriminatory rate, and that present discrimination could be eliminated by entering an order in the Section 5 docket as well. Both of these remedies were, in fact, recommended by the examiner in this case.

V. The issues raised by petitioners are properly before this Court.

Phillips Petroleum Company argues strenuously (Phillips brief, pp. 19-23) that the issues presented by petitioners

are not properly before this Court; the point is partially concurred in by the Federal Power Commission (FPC brief, p. 52). In essence, respondents argue that we did not properly preserve the objections urged here in that we failed to raise the matters in our petitions for rehearing to the Commission; in addition Phillips alleges that we have raised in our main brief an issue not presented in our petition for certiorari.

It is our position that all issues presented in our main brief were raised either by Wisconsin's or New York's application for rehearing; that in any event these issues were raised by other parties, thereby giving the Commission an opportunity to pass on them prior to the taking of an appeal; and that the two questions presented in our main brief are merely a logical division of the one question presented in our petition for certiorari.

The application for rehearing filed by Wisconsin (R. 349-362), while it did not challenge the dismissal of the Section 5 investigation, clearly challenged both the FPC's disavowal of cost as a basis for regulation under Sections 4 and 5 of the Act (R. 352-353) and the FPC's allowance in the Section 4 dockets of specific increased rates which were in excess of the average cost of service determined by the Commission (R. 360-361). In its brief to this Court the Commission suggests that Wisconsin did not adequately raise the discrimination issue in seeking Commission rehearing; we note that, in denying rehearing, the Commission itself regarded Wisconsin's allegation as a claim of discrimination (R. 397):

> "The fact that some of [the increased] rates are in excess of the average cost of service determined by us is immaterial. Phillips' rates would normally vary greatly because the sales are made at widely separated points and under different conditions, *and*

there is nothing to show that these rates are discriminatory or preferential." (Emphasis added.)

New York's application for rehearing was mailed from New York in time to reach the Federal Power Commission within the 30-day period of Section 19(a), even as interpreted by the FPC, and copies of the petition did in fact reach all other Washington parties within that period. The FPC, however, asserted that its copies arrived a day late and for that reason rejected New York's application. Because the points raised in New York's application for rehearing (including specifically the Section 5 point) were, as the Commission itself noted,[22] covered by the applications filed by other parties, and because the other parties were in the process of preparing appeals, it seemed to New York that, rather than litigate whether its application had been timely filed, it would be more appropriate merely to seek intervention in one of the other appeals. That course was followed in the court below and, over the FPC's objection, New York was permitted to intervene in the Eastern Seaboard distributor company appeal (D. C. Cir. No. 16177) as a party-intervener in support of petitioners; accordingly, it stands in the same position as the parties on whose behalf it intervened. Even Phillips would concede that the Section 5 point was raised by the Eastern Seaboard distributors.

In any event, the federal courts have been loath to expand the rule, that an objection must be raised below

---

[22] In rejecting New York's application, the FPC stated (R. 399-400):

> "Actually the application was directed to some of the same problems covered by the other applications for rehearing, particularly our decision not to determine Phillips' rates for the future, so that if we had accepted PSC's application for rehearing we would not have reached a different conclusion."

before it will be considered on appeal, beyond the limits of the reason for the rule. The leading case in this area is *Hennesey* v. *S. E. C.*, 285 F. 2d 511 (3rd Cir. 1961). In that case, Hennesey had intervened in an SEC proceeding and had appeared at the opening day of hearings to voice its objections to the application there involved. Hennesey did not, however, participate in the lengthy hearings which followed; neither did it file a brief with the examiner nor exceptions with the Commission when the examiner decided in favor of the applicant. When Hennesey sought review of the Commission's grant of the application, the applicant before the SEC moved to dismiss, relying on Section 43(a) of the Investment Company Act of 1940, 15 U. S. C. §80a-42(a), which reads:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do."[23]

The points which Hennesey sought to raise on review had not been raised by it before the SEC, although they had been raised by other parties, none of whom took an appeal. The Third Circuit held that, for purposes of review, it is sufficient that the issues be raised before the agency. The purpose of Section 43(a), said the court, was to assure

> "that it is the agency and not the courts which passes first on the contentions of the participants. . . . This purpose is advanced so long as the contentions and exceptions raised on review have been in fact effectively and meaningfully raised before the regulatory agency. This is true regardless of whether the person who appeals the agency decision or some other person aggrieved by the decision happens to have

[23] This provision is virtually identical to the corresponding provision of Section 19(b) of the Natural Gas Act.

raised the points before the agency." 285 F. 2d at 515.

The court further noted that any other interpretation would be inconsistent with the maintenance of orderly and rational procedure before the agency. If each person were required to raise every contention and argument which he wished to preserve for appeal,

> "such a person would be forced to pursue one of two equally futile courses. Either he would have to repeat the testimony, cross-examination, exceptions, briefs and the other activities of the participants with interests, like to his, . . . or he could, at the conclusion of each step of the litigation formally adopt all that had been done by others . . . in a kind of 'me-too' manner." *Id.* at 516.

Under *Hennessey*, therefore, the question is whether the objections presented here by Wisconsin and New York were urged in *any* application for rehearing; the Commission's order denying rehearing demonstrates that the Commission, at least, was satisfied that they were.[24]

The argument made by Phillips (brief, p. 23) that the division of the single question in our petition for certiorari into two points in our main brief violates the rules of this Court is without merit. Contrary to Phillips' suggestion, the statement of the question presented in our petition specifically referred to both Sections 4 and 5 of the Natural Gas Act; in our brief on the merits we merely separated the Section 4 and Section 5 points for greater convenience in briefing.

---

[24] To the extent that our arguments in this Court are phrased in somewhat different language than in our applications for rehearing before the Commission, it is due in large measure to the present posture of the case and the regulatory situation resulting from the court of appeals' decision.

Conclusion.

The consumer's basic right under the Natural Gas Act is to just and reasonable rates. As we have shown, these can be determined only by reference to costs. In this proceeding the Commission terminated the Section 4 dockets, even though many of the increased rates thereby allowed for the past period (1955-1959) exceeded Phillips' cost of service and hence were not just and reasonable, and it terminated the Section 5 investigation, even though most of Phillips' present rates and its average revenue exceed the cost of service. Moreover, the Commission's present program of producer regulation—of which its Phillips decision is a key part—permits the continued collection of rates which have never been tested as to their justness and reasonableness and which, under the Commission's program, will not be for years.

For the reasons set forth here and in our main brief, petitioners respectfully request that this Court vacate the judgment of the court of appeals and direct that court to remand the case to the Federal Power Commission for the

purpose of fixing just and reasonable rates for Phillips Petroleum Company on the basis of its costs.

Dated: December 14, 1962.

Respectfully submitted,

JOHN W. REYNOLDS,
Attorney General, State of Wisconsin,

ROY G. TULANE,
Assistant Attorney General, State of Wisconsin,
State Capitol,
Madison 2, Wisconsin,

Attorneys for State of Wisconsin.

WILLIAM E. TORKELSON,
Chief Counsel, Public Service Commission of Wisconsin,
State Office Building,
Madison 2, Wisconsin,

Attorney for Public Service Commission of Wisconsin.

KENT H. BROWN,
Counsel, Public Service Commission of the State of New York,
55 Elk Street,
Albany 1, New York,

MORTON L. SIMONS,
1815 H Street, N. W.,
Washington 6, D. C.,

BARBARA M. SUCHOW,
Assistant Counsel, Public Service Commission of the State of New York,
199 Church Street,
New York 7, N. Y.,

Attorneys for Public Service Commission of the State of New York.

APPENDIX A.

The Field Price of Natural Gas, 1938-1962.

In its brief, the Federal Power Commission relies on field price information published by the FPC since 1953 and by the Bureau of Labor Statistics since January 1961. We believe that it would be helpful for the Court to have field price data for the entire period since 1938.

There are three governmental sources which publish such data:

1. The Bureau of Mines (Department of the Interior) has published figures for each year since 1938; its figures cover all sales, both interstate and intrastate.

2. The FPC has published figures for each year since 1953; the FPC data cover interstate sales only.

3. The Bureau of Labor Statistics has published monthly figures since January 1958; these figures, which are collected for the Bureau by the American Gas Association, represent sales to about twenty major pipelines, all but one of which are interstate.

	Bureau of Mines (all figures in cents per Mcf)	FPC	BLS
1938	4.9¢	—	—
1939	4.9	—	—
1940	4.5	—	—
1941	4.9	—	—
1942	5.1	—	—
1943	5.2	—	—
1944	5.1	—	—
1945	4.9	—	—
1946	5.3	—	—
1947	6.0	—	—
1948	6.5	—	—
1949	6.3	—	—
1950	6.5	—	—
1951	7.3	—	—
1952	7.8	—	—
1953	9.2	9.0¢	—
1954	10.1	9.9	—
1955	10.4	10.6	—
1956	10.8	11.3	
1957	11.3	12.0	—
1958	11.9	13.0	12.9¢
1959	12.9	14.3	14.3
1960	14.0	15.6	15.5
1961	15.1	—	16.3

Monthly Data (per BLS).

	1958	1959	1960	1961	1962
January	12.38¢	14.05¢	14.98¢	16.01¢	16.40¢
February	12.62	13.93	14.98	16.20	16.72
March	12.56	14.11	15.16	16.11	16.60
April	12.74	14.05	15.15	16.15	16.55
May	12.77	14.26	15.18	16.21	16.74
June	12.63	14.10	15.29	16.28	16.61
July	12.70	13.95	15.62	16.30	16.65
August	13.03	14.49	15.97	16.46	16.36
September	13.03	14.38	16.05	16.50	16.72
October	13.37	14.45	15.98	16.32	—
November	13.32	14.55	15.87	16.31	—
December	13.60	14.82	15.85	16.45	—
Average	12.90¢	14.26¢	15.51¢	16.28¢	—

APPENDIX B.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Decision.

Gulf Oil Corporation — Docket Nos. G-9520 *et al.*

UPON A CONSOLIDATED PROCEEDING UNDER SECTIONS 4(e) AND 5(a) OF THE NATURAL GAS ACT TO DETERMINE JUST AND REASONABLE RATES FOR AN INDEPENDENT PRODUCER.

(Issued September 24, 1962)

* * * * * *

HALL, Presiding Examiner:

* * * * * *

The minimum task of the Commission at this stage of producer rate regulation is to carry on on a case-by-case basis and do now what it is capable of doing. This will maintain consumer protection and bring meaningful knowledge in the consideration of area methods. As stated by the Examiner in his decision issued April 9, 1962, in *Amerada Petroleum Corporation, Docket Nos. G-9385, et al.* (p. 19 (mimeo)), "Individual cost-of-service rate making proceedings are still laboratories where many valuable lessons in rate regulation may be learned on a small scale without involving the whole industry in every experiment." The valuable lessons will flow directly from the fact that individual cases, through a more thorough churning of facts, claims and counterclaims, will enable the Commission to sort things out; make them clear; and keep them simple. Moreover, action in individual cases makes regulation a present reality rather than a distant hope, with each new case being approached with a background of progress and greater perspective.

The wisest approach to producer rate regulation is not to permit gaps in such regulation pending the testing of

different methods. In fact the frequently announced policy of the Commission—since the issuance of its decision on September 28, 1960, in *Phillips Petroleum Co.*, 24 FPC 537—to move forward with individually determined producer cases appears to reflect the fact that no area proceeding has been concluded and it would be unwise to prejudge the outcome of those proceedings. Time is important and could be irretrievable. Under no circumstances can the Commission take the chance of seeing each day that passes without producer regulation bring closer the day when all could appear to be hopeless.

• • • • • •

In conclusion the Examiner desires to point out that this case, like the *Amerada, Sun, Union* and several other independent producer rate cases have proceeded through pioneering and costly stages and required greater amounts of time in hearing initially than will hereafter be required because these types of cases had not been processed prior to *Phillips*. Initial decisions have been written by Examiners in a number of cases. In other proceedings the hearings have been concluded and initial decisions may be expected soon. Of special significance in this connection is the fact that the pending producer rate cases now ready for decision present, for the most part, common basic contested issues, which are extremely few in number (see note, 6, p. 8, *supra*), so that the decision in any one of the pending cases will necessarily decide the substantial issues in nearly all pending producer rate cases. In these cases it is not the basic facts which are in dispute, but only the principles which are to be applied to those facts. Accordingly, Commission decision on the fundamental issues in this or any other pending basic rate case is the most feasible method of reaching final decision in all such cases within a reasonable time. Moreover, such action may implement and aid in the expedition and conclusion of area proceedings (see pp. 5-6, 31, note 22, *supra*) by providing guidelines for the Examiners and the parties in those proceedings. On the other hand, should the Commission per-

mit all the pending independent producer cases now in advanced stages to be settled without fixing uniform rates for the future, the time, effort, expense, etc., which went into those proceedings to clear away uncertainty will largely be wasted and the full usefulness of those proceedings negated and the producer situation left confused and undecided.

* * * * * *

The Commission has within its grasp the power to perfect the general application of its decision in this case and its action will have a most salutary effect in development and articulation of guiding principles all along the line of producer regulation. Insofar as the *City of Detroit* and *Panhandle* cases are concerned, the one great principle making an indelible impression is that when the Commission departs from fundamentals of rate-making, which have not changed, its action is reversed, as it was in *City of Detroit*, and when it returns to and continues to apply those fundamentals its decision is sustained, as it was in *Panhandle*. In this connection it seems appropriate to observe that a Commission determination on the merits of this and the other combination Section 4(e) and 5(a) proceedings now pending, particularly because of their precedential value, will do more to break the logjam of pending rate cases, as well as many certificate cases, than any other action which the Commission can now take.

This case is a good case for regulatory action in the total public interest, if it is known what to do with it. The Commission having directed the Examiner to determine Gulf's rates on the basis of the record herein; to eliminate preference and discrimination among Gulf's customers; and fix Gulf's rates for the future, knows what to do with it. The Commission's obligation now is to carry on through with its original intention in setting this consolidated proceeding for hearing. [Mimeo. edition, pp. 5-6, 77-78, 79]